

Questions of Senator Tom Coburn, M.D.

*"Nomination of Thomas Perez to Assistant Attorney General for the Civil Rights
Division, Department of Justice"*

United States Senate Committee on the Judiciary

April 29, 2009

1. In 2006, in connection with the Center for American Progress, you wrote an article for *Mother Jones* that was critical of an amendment I offered to immigration legislation. My amendment repealed Executive Order 13166, which "requires federal agencies to ensure that people with limited English skills can access their services and programs, and also requires federal agencies to develop language access guidelines for other federally funded programs that are not directly managed by the federal government." You wrote that the amendment "could literally mean the difference between life and death for medical patients with limited English" and that I showed "a distressing disregard for the doctor-patient relationship." You further wrote that, "by promoting this amendment, [I would] undermine meaningful communication between doctors and patients – thus relegating those who do not speak English to a lower rung of our health care system."
- a. Mr. Perez, please defend your statements concerning the amendment I offered to repeal this Executive Order.

Answer: Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." It is well settled pursuant to longstanding Supreme Court precedent that under Title VI and the accompanying regulations, health care providers who receive federal financial assistance have a legal obligation to ensure that people with limited English proficiency can meaningfully access the program or service. This is the law of the land, and if confirmed as Assistant Attorney General for Civil Rights, I would have an obligation to enforce it.

Executive Order 13166 was a Presidential directive issued by President Clinton telling federal agencies to (1) promulgate guidance for recipients of federal financial assistance outlining the recipient's obligations under Title VI to ensure meaningful access for people with limited English proficiency, and (2) develop and implement a plan to improve access to federally conducted programs, such as Medicare. In October 2001, following a careful review of the Executive Order, the Bush Administration issued a Memorandum that affirmed the continuing vitality of Executive Order 13166, reiterated the obligations imposed by Title VI, and reestablished that the Executive Order is consistent with Title VI, and seeks to give additional clarity to Title VI.

In my article that is referenced in your question, I outlined the aforementioned law, and discussed the interplay between the Executive Order and the obligations under Title VI. I pointed out the importance of meaningful communication between doctors and patients. Communication barriers between physician and patient can lead to medical errors, and I

provided a tragic real life example of a language barrier that resulted in a preventable death. Title VI continues to be the law of the land, and health care providers who receive federal financial assistance continue to have an obligation to ensure that people with limited English proficiency can meaningfully access the service. I agree with the Clinton and Bush administrations that the Executive Order is consistent with Title VI and will help facilitate the delivery of quality health care to people with limited English proficiency.

2. Do you believe that health care services are a civil right that should be available to all in the United States, no matter their citizenship? Why or why not?

Answer: Congress has established that citizenship is a requirement for the receipt of certain health care services, and provided limited circumstances, such as Emergency Medicaid, where citizenship is not a legal requirement for the receipt of health care services. If confirmed, I would enforce the laws that have been enacted by Congress, to the extent they fall within the jurisdiction of the Civil Rights Division.

- a. Do your goals for the Civil Rights Division include restructuring the Division to focus on health care or setting up a separate health care section?

Answer: I have not had an opportunity to conduct a thorough review of the current structure of the Civil Rights Division. As a result, I cannot make informed judgments at this juncture about what structural changes, if any, should be made within the Division.

However, no matter the structure of the Division, I do believe it has a role to play in the healthcare setting because it enforces Title VI of the Civil Rights Act of 1964, which require recipients of federal financial assistance, including but not limited to certain health care providers, to ensure that people with limited English skills can meaningfully access programs and services.

- b. During your race for Maryland Attorney General, you stated, "It's very, very important to use the office of the Attorney General, to use laws that are on the books, to expand laws that need to be on the books, and to use the Bully Pulpit to expand access to affordable health care..."¹

- i. Do you believe the Civil Rights Division has a role in affecting health care policy? If so, how?

Answer: I do believe the Division has a role to play in the healthcare setting because it enforces Title VI of the Civil Rights Act of 1964, which requires recipients of federal financial assistance, including but not limited to certain health care providers, to ensure that people with limited English skills can meaningfully access programs and services.

¹ Interview with Tom Perez, The Coffee House, Open Source Movies (July 2006), available at www.archive.org/stream/coffeehouse_TCH_111.07.06/coffeehouse_TCH_11_07.06.mp4

- ii. Would you use your position as head of this Division as a “bully pulpit” to force health care providers to provide additional services, such as requiring services to be conducted in a language other than English?

Answer: If confirmed, I will speak about the need to enforce all of the Nation’s Civil Rights laws, including Title VI, which requires recipients of federal financial assistance, including but not limited to certain health care providers, to provide people with limited English skills meaningful access to programs and services.

3. On April 6th, the Oklahoma Senate received a joint resolution from the Oklahoma House of Representatives that would declare English the official language of the State of Oklahoma. The House passed it with a vote of 66-32. One of the exceptions to the requirement that English be the primary language used by Oklahoma is if a certain official use is specifically required by federal law. The resolution notes that “federal law” does not include federal Executive Orders, and specifically excludes EO 13166. Before the Senate even had an opportunity to consider the bill, the Civil Rights Division preemptively sent a letter to Oklahoma Attorney General Drew Edmondson, warning him that the proposed “English only” state constitutional amendment may conflict with Title VI and EO 13166 and essentially threatening prosecution if it were adopted.

- a. Do you agree with the assessment by the Civil Rights Division that Oklahoma’s implementation of the amendment poses conflicts with protecting alleged civil rights of limited English proficient (LEP) persons?

Answer: I do not have sufficient information to make an informed judgment about the Oklahoma bill. If confirmed, I would carefully review the letter and the circumstances surrounding the Oklahoma proposal. States can enact “English Only” provisions as long as they comply with Title VI of the Civil Rights Act of 1964.

- b. Do you believe it is appropriate for the Civil Rights Division to issue such a letter to an individual state considering such legislation? Did the Division do so when other states were considering similar legislation?

Answer: If the Civil Rights Division believes that a state’s “English Only” provisions do not comply with Title VI of the Civil Rights Act of 1964, it would be appropriate for it to issue that sort of letter. However, I do not have sufficient information to make an informed judgment about this particular letter. I am not aware that any other state has considered exactly the legislation Oklahoma did.

- c. Thirty states have declared English as their official language, often by wide margins. Do you believe that EO 13166 undermines the right of states to declare English as their official language?

Answer: I do not believe that Executive Order 13166 undermines the rights of states to declare English as their official language. Executive Order 13166 does not create new

obligations for states. As such, states can enact such provisions as they do so in a manner that is consistent with their obligations under Title VI.

- d. Do you believe the EO 13166 has a fiscal impact on federal or state governments? Why or why not?

Answer: I do not believe that Executive Order 13166 has a fiscal impact on state or federal governments because it imposes no new requirements on them.

4. Do you believe racial preferences are constitutional? If so, when?

Answer: The Supreme Court has established that race conscious decisionmaking is constitutional in limited circumstances. That is, in order to withstand constitutional muster, the race conscious program or policy must be narrowly tailored to further a compelling governmental interest.

- a. Do you believe that racial preferences are appropriate in college or professional school admissions processes? If so, why?

Answer: In the higher education context, the Supreme Court in Grutter v. Bollinger, 539 U.S. 306 (2003), established that the educational benefits that flow from a diverse student body can constitute a compelling governmental interest justifying the use of narrowly tailored, race conscious admissions policies.

- b. Do you believe that race should play a greater role in hiring decisions by federal or state government entities than any other requirement, such as education, work experience or results of required industry tests/examinations?

Answer: I support reaching out and making special efforts to recruit groups that historically have been underrepresented in the workforce to make them aware of employment opportunities. I believe that employers should review their employment practices to include, recruitment, selection, and promotional criteria, to ensure that these criteria do not discriminate on the basis of race, religion, sex, national origin or disability, and that the criteria are predictive of successful job performance. However, I oppose requiring employers, either overtly or indirectly, to employ a less qualified applicant over a more qualified applicant because of that individual's race, religion, sex, national origin or disability.

5. In Crawford v. Marion County Election Board,² the Supreme Court rejected a facial challenge to Indiana's voter identification law by a 6-3 vote. Indiana's voter ID law requires that voters present a federal or state photo ID at the polls. In his opinion announcing the Court's judgment, Justice Stevens acknowledged that the record did not reflect any examples of in-person voter fraud in Indiana. Nevertheless, he added:

² 128 S. Ct. 1610 (2008).

It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—though perpetrated using absentee ballots and not in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.³

Do you agree with the Court's judgment in this case?

Answer: The Supreme Court in the Crawford case recognized that preventing voter fraud is an important government interest and that Indiana's voter ID law served that interest. I agree that the United States has an important interest in ensuring that only voters who are eligible to vote actually vote, and that the United States also has an important interest in eliminating voting practices that discriminate on the basis of race, color, or membership in a language minority group.

a. If confirmed, will you make combating in-person voter fraud a priority?

Answer: The enforcement of most voter fraud cases is the responsibility of the Criminal Division of the Department of Justice, working in collaboration with United States Attorneys' offices. The Civil Rights Division has a role in cases involving situations where race, color, national origin, or religious discrimination is a factor, or where there is an allegation of a conspiracy to injure, oppress, threaten, or intimidate a voter. If confirmed, I would work collaboratively with the Criminal Division to coordinate enforcement of laws pertaining to voting.

b. A 2007 study by the University of Missouri found that there is no evidence that Indiana's photo identification law reduced voter turnout, either overall, or in counties with relatively larger racial or ethnic minority populations. Interestingly, the study also found that "The only consistent and frequently significant effect of voter ID . . . is a positive effect on turnout in counties with a greater percentage of Democrat-leaning voters."⁴ Doesn't that provide some evidence against the argument that voter identification laws disenfranchise voters?

Answer: I am not familiar with the study you cite, but if confirmed, in working with the Criminal Division on voter fraud enforcement, I would review studies relevant to the issue, including but not limited to the University of Missouri study.

c. Dawn Johnsen, President Obama's nominee to head the Office of Legal Counsel maintains that Indiana's voter ID law is "excessive and indefensible" and that the law was an attempt by Republicans to "suppress" votes. Do you agree with her assessment?

³ *Id.* at 1619 (footnotes omitted).

⁴ Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, Institute of Public Policy, Report 10-2007 (revised Dec. 2007), at 2.

Answer: The Court in Crawford recognized that preventing voter fraud is an important government interest and that Indiana's voter ID law served that interest. As can be seen in the Crawford opinion, the legality of voter ID laws depends on the facts and circumstances of the particular case. If I am confirmed, I will follow the Crawford precedent, which recognized that the United States has an interest in ensuring that only voters who are eligible to vote actually vote, while at the same time enforcing laws designed to eliminate voting practices that discriminate on the basis of race, color or membership in a language minority group.

6. At your hearing, you stressed your desire to ensure the "aggressive and even-handed enforcement of hate crimes laws." Please identify the existing federal hate crimes laws you will seek to enforce. Do you believe current law is sufficient to address "hate crimes" in the United States? If not, how do you believe it should be expanded? If you are not already familiar with H.R. 1913, which passed the House on April 29, 2009, please review that bill and respond as to whether you believe the expansions in that bill are appropriate or necessary.

Answer: I spent a number of years prosecuting hate crimes, and observed first hand the unique, insidious damage that hate crimes inflict not simply on the actual victims themselves, but the community as a whole. I also confronted examples of cases in which justice was not served because of weaknesses in the federal statutory framework.

Hate crime enforcement is one of the Administration's top civil rights priorities. The Civil Rights Division will enforce all of the existing hate crime statutes on the books. The Attorney General has stated, and I believe as well, that the existing federal hate crimes laws should be strengthened. The expanded federal jurisdiction in the legislation pending in Congress is a backstop for state and local jurisdictions; the majority of hate crimes cases will continue to be prosecuted by the states, as they should. The pending hate crimes legislation covers only violent attacks involving fire, a firearm, a dangerous weapon or an explosive device that cause bodily injury, and attempts to cause injury through these violent means, while protecting our freedom of speech and association.